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PRE-TRIAL CHAMBER I

Before: **Judge Iulia Antoanella Motoc, Presiding Judge**
Judge Reine Adélaïde Sophie Alapini-Gansou
Judge Nicolas Guillou

SITUATION IN THE STATE OF PALESTINE

Public

Written observations pursuant to Rule 103 (Addameer)

Source: **Addameer Prisoner Support and Human Rights Association**

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Mr. Karim A. A. Khan KC

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants (Participation/Reparation)

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States' Representatives
Competent Authorities of the State of Palestine

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I. INTRODUCTION

1. These observations are filed pursuant to Pre-Trial Chamber I's "*Decision on requests for leave to file observations pursuant to rule 103 of the Rules of Procedure and Evidence*" issued on 22 July 2024. That Decision granted Addameer Prisoner Support and Human Rights Association (***Addameer***) permission to file written observations on the matter on which the United Kingdom had previously sought and been granted permission to make observations under Rule 103, namely "*[w]hether the Court can exercise jurisdiction over Israeli nationals, in circumstances where Palestine cannot exercise criminal jurisdiction over Israeli nationals pursuant to the Oslo Accords*."[1] That request had been made by the United Kingdom in response to the Prosecutor's announcement that he had filed applications for the issuance of arrest warrants for Israel's Prime Minister and Defence Minister in respect of crimes "*committed on the territory of the State of Palestine (in the Gaza strip)*".[2]

2. The United Kingdom has since decided not to file any observations, but the same core argument has been raised by other interveners.[3] It is that the International Criminal Court (***ICC*** or ***Court***) cannot exercise jurisdiction in respect of crimes committed by Israeli nationals in whole or in part on Palestinian territory because (i) Palestine purportedly lacks criminal jurisdiction over Israeli nationals under the Oslo Accords, and (ii) the Court exercises only the jurisdiction delegated to it by the relevant State (here, Palestine).[4] The key part of the Oslo Accords relied upon is Annex IV to Oslo II titled "*Protocol Concerning Legal Matters*", Article I of which is titled "*Criminal Jurisdiction*" and provides that "*Israel has sole criminal jurisdiction*" over offences committed by Israelis in the West Bank (including East Jerusalem) and the Gaza Strip (***Gaza***).[5]

3. As detailed below, this argument is wrong because: (i) the Court does not exercise

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[1] *Situation in the State of Palestine*, Request by the United Kingdom for Leave to Submit Written Observations Pursuant to Rule 103, 10 June 2024, ICC-01/18-171-Anx, para. 27(i); *Situation in the State of Palestine*, Public redacted version of 'Order deciding on the United Kingdom's request to provide observations pursuant to Rule 103(1) of the Rules of Procedure and Evidence', and setting deadlines for any other requests for leave to file amicus curiae observations, 27 June 2024, PTC I, ICC-01/18-173-Red, para. 1.

[2] Office of the Prosecutor, Statement of ICC Prosecutor Karim A.A. Khan KC: Applications for arrest warrants in the situation in the State of Palestine, 20 May 2024.

[3] Filed and publicly available at the date of this submission: Situation in the State of Palestine, *Amicus Curiae* Observations of Professor Steven E. Zipperstein Pursuant to Rule 103, 2 August 2024, ICC-01/18-261 (***Zipperstein Amicus Observations***); Situation in the State of Palestine, Observations with respect to the Situation in Palestine on behalf of the European Centre for Law & Justice, 31 July 2024, ICC-01/18-260 (***ECLJ Amicus Observations***).

[4] Declaration of Principles on Interim Self-Government Arrangements, 13 September 1993, annexed to UN Doc. A/48/486–S/26560, 11 October 1993 (***Oslo I***); Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, 28 September 1995, reproduced in (1997) 36(3) *ILM* 557 (***Oslo II***) (together, the ***Oslo Accords***).

[5] Oslo II, Annex IV, Article I(1)-(2). See also Olso II, Article XVII(2)(c) ("*The territorial and functional jurisdiction of [the Palestinian] Council will apply to all persons, except for Israelis, unless otherwise provided for in this Agreement*").

delegated jurisdiction (**Section II**); (ii) in any event, any such delegation would be of Palestine's general jurisdiction as a State under customary international law which is not affected by the Oslo Accords (**Section III**); (iii) bilateral agreements are binding only *inter se* and are not opposable to the Court (**Section IV**); and (iv) Oslo II cannot be interpreted as affecting Palestine's duty, or its corresponding jurisdiction, to prosecute or extradite Israeli nationals in respect of international crimes (**Section V**). It follows that the Oslo Accords have no impact on the Court's jurisdiction over crimes committed by Israeli nationals in whole or in part on Palestinian territory.

II. THE COURT DOES NOT EXERCISE DELEGATED JURISDICTION

4. In deciding on the Prosecutor's application for arrest warrants pursuant to Article 58(1) of the Statute, the Pre-Trial Chamber must be satisfied that "*[t]here are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court*". The scope of the Court's jurisdiction is determined by a proper construction of the Statute.[6]

5. Article 12(2) of the Statute provides that the Court may exercise jurisdiction if the State "*on the territory of which the conduct in question occurred*" is a party to the Statute or has accepted the jurisdiction of the Court. The conduct in question occurred on Palestinian territory.[7] Palestine has been a State party to the Statute since 1 April 2015.[8] The situation in Palestine was the subject of referrals from Palestine in 2018,[9] and from seven other States in November 2023 and January 2024.[10] The Court accordingly has jurisdiction over crimes committed in whole or in part[11] on Palestinian territory regardless of the nationality of the perpetrator/s. That Palestinian territory is occupied[12] does not prevent it from being the

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[6] Rome Statute, Article 1 ("*The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute*") and Article 21(1)(a) ("*The Court shall apply: (a) In the first place, this Statute…*"); Vienna Convention on the Law of Treaties, 23 May 1969 (entered into force 28 January 1980) 1155 UNTS 3 (**VCLT**), Articles 31-32.

[7] Office of the Prosecutor, Statement of ICC Prosecutor Karim A.A. Khan KC: Applications for arrest warrants in the situation in the State of Palestine, 20 May 2024; *Situation in the State of Palestine*, Decision on the 'Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine', 5 February 2021, PTC I, ICC-01/18-143, para. 118 ("*the Court's territorial jurisdiction … extends to … Gaza and the West Bank, including East Jerusalem*").

[8] Secretary-General of the United Nations, Rome Statute of the International Criminal Court, Rome, 17 July 1998, State of Palestine: Accession, 6 January 2015, C.N.13.2015. TreatiesXVIII.10 (Depositary Notification); Rome Statute, Article 126. Palestine had previously lodged an Article 12(3) declaration on 1 January 2015.

[9] Office of the Prosecutor, Notification of the referral from the State of Palestine, 22 May 2018, ICC-01/18-1-AnxI.

[10] Joint referral by South Africa, Bangladesh, Bolivia, Comoros and Djibouti, 17 November 2023; Joint referral by Chile and Mexico, 18 January 2024.

[11] *Situation in the Republic of Bangladesh/Republic of the Union of Myanmar*, Decision on the 'Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute', 6 September 2018, PTC I, ICC-RoC46(3)-01/18-37, para. 64.

[12] The ICJ has recently confirmed that all of Palestinian territory, that is the West Bank including East Jerusalem and Gaza, remains occupied: *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied*

"*territory of*" Palestine for the purpose of Article 12(2).[13]

6. The Court's jurisdiction under Article 12(2) is not qualified by any limitation on a State's criminal jurisdiction arising from its domestic legal framework or agreements with other States. This is because the Court does not exercise States' delegated jurisdiction; it exercises *international* criminal jurisdiction accepted by the States Parties. In particular:

a. The Statute does not speak of States "*delegating*" or "*transferring*" jurisdiction to the Court; rather, pursuant to Article 12(1), each State Party "*accepts*" the jurisdiction of the Court as set out in the Rome Statute. The Statute contains no basis for suggesting that the Court's jurisdiction is in any way limited by the scope of a State's particular criminal jurisdiction under its domestic laws or treaties concluded with other States.[14]

b. To the contrary: (i) the cornerstone principle of complementarity envisages the Court exercising jurisdiction in precisely the situation where a State is not investigating or prosecuting a potential case for whatever reason (often termed "*inactivity*"), including because it might lack the legal ability to do so pursuant to domestic law or treaties with other States;[15] and (ii) the Statute deals explicitly with conflicts between the Statute and a State's other treaty obligations, but it does so *only* with regard to matters of cooperation in Article 98(2),[16] confirming the explicit choice of the drafters *not* to qualify the Court's jurisdiction on the same basis.[17]

Palestinian Territory, Including East Jerusalem, Advisory Opinion, ICJ General List No. 186, 19 July 2024 (***ICJ OPT Advisory Opinion***), paras 86-94.

[13] As to occupation: *Prosecutor v. Thomas Lubanga Dyilo*. Decision on the Prosecutor's Application for a Warrant of Arrest, Article 58, PTC I, ICC-01/04-01/06-1-Corr-Red, 10 February 2006, para. 27 and *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Confirmation of Charges, PTC I, ICC-01/04–01/06-803-tEN, 29 January 2007, paras. 166 and 220, finding that crimes occurring in Ituri were "*on the territory of*" the DRC notwithstanding it was occupied by Uganda. See also Office of the Prosecutor, Report on Preliminary Examination Activities, 5 December 2018, paras. 62-63, 68 and 80 (regarding Crimea as occupied Ukrainian territory). See similarly as to effective control: *Situation in Georgia*, Decision on the Prosecution Request for authorization of an investigation, 27 January 2016, PTC I, ICC-01/15-12, paras. 6 and 64 (affirming that jurisdiction extended to South Ossetia over which Georgian authorities had no effective control).

[14] The reference to "*applicable treaties*" in Article 21(1)(b) as a form of subsidiary "*applicable law*" provides no such basis: bilateral treaties (to the extent the Oslo Accords are binding treaties: see footnote 37 below) are not caught by this provision, nor in any event could they override the primacy of, or be used to read down, the Statute.

[15] Rome Statute, Article 17(1); Schabas and El Zeidy, "Article 17" in Ambos (ed), *The Rome Statute of the International Criminal Court: A Commentary* (4th ed, 2022), pp. 962-965 (explaining the inactivity enquiry, and that inability and unwillingness only arise if the State is investigating or prosecuting the potential case(s)). See also *Situation in the Islamic Republic of Afghanistan*, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation, PTC II, ICC-02/17-33, 12 April 2019, paras. 74-75, taking into account the existence of a domestic amnesty law in assessing inactivity.

[16] Rome Statute, Article 98(2) ("*The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements*" unless conditions are met).

[17] ECLJ Amicus Observations, paras. 14-16 concerning Article 98(2) proceed from the incorrect premise that the Court's jurisdiction is delegated.

c. It would be inconsistent with the object and purpose of the Rome Statute ("*to put an end to impunity*" and to ensure that "*the most serious crimes of concern to the international community as a whole must not go unpunished*" by creating "*an independent*" Court[18]) for the Court's jurisdiction to be based on an inconsistent patchwork of domestic criminal competences. It would also render the Court's jurisdiction liable to abusive derogations, contrary to the intention behind the Statute's prohibition on reservations.[19]

d. The *travaux préparatoires* confirm that upon a State's ratification/accession to the Statute, the Court would have "*automatic jurisdiction*" in respect of crimes committed in its territory or by its nationals, with no possibility to opt out.[20]

e. The Appeals Chamber has confirmed that international courts "*do not act on behalf of a particular State or States. Rather, international courts act on behalf of the international community as a whole*."[21] The Court's exercise of jurisdiction therefore goes beyond that of States' jurisdiction domestically; limitations that apply domestically, such as Head of State immunity, "*find no application in relation to an international court such as the International Criminal Court*".[22] In this regard, the fact that the Court can do what States cannot do under their own internal laws makes clear that the Court is exercising its *own international* criminal jurisdiction, not jurisdiction delegated from States.

f. The foregoing is consistent with Pre-Trial Chamber I's statement in its February 2021 decision on the Court's territorial jurisdiction that the Oslo Accords "*are not pertinent to … the scope of the Court's territorial jurisdiction in Palestine*".[23]

7. It follows that the ordinary meaning of the terms of Article 12, read in the context of the Statute as a whole, and in light of its object and purpose,[24] make clear that the Court exercises its own *international* criminal jurisdiction, not the delegated jurisdiction of States. This is

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[18] Rome Statute, preambular paras. 4-5 and 9.

[19] Rome Statute, Article 120.

[20] Schabas and Pecorella, "Article 12" in Ambos (ed), *The Rome Statute of the International Criminal Court: A Commentary* (4th ed, 2022), p. 815 (save as provided for in the transitional provision in Article 124).

[21] *Prosecutor v. Al Bashir*, Judgment in the Jordan Referral re Al-Bashir Appeal, AC, ICC-02/05-01/09-397Corr, 6 May 2019, para. 115.

[22] Ibid. See also as regards domestic amnesties: *Prosecutor v. Gaddafi*, Decision on the 'Admissibility Challenge by Dr. Saif Al-Islam Gadafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute', PTC I, ICC-01/11-01/11-662, 5 April 2019, paras 77-78 (and Separate Opinion of Judge Marc Perrin de Brichambaut, para. 148).

[23] Ibid, para. 129.

[24] VCLT, Article 31.

confirmed by the *travaux préparatoires* and the practice of the Court.[25]

III. IN ANY EVENT, ANY DELEGATION WOULD BE OF THE GENERAL CUSTOMARY INTERNATIONAL LAW JURISDICTION OF A STATE, WHICH PALESTINE POSSESSES

8. Even if Article 12 of the Rome Statute were deemed to give effect to a system of delegated criminal jurisdiction (*quod non*), what would be delegated is the general jurisdiction that States possess under customary international law, and not any specific jurisdiction that a State possesses pursuant to domestic law and/or agreements with other States. This is confirmed by:

a. the text of the Statute, which, as noted above, (i) does not qualify the Court's jurisdiction by reference to the scope of individual States' domestic competences, and (ii) qualifies the Statute in light of other specific treaty obligations *only* in respect of cooperation under Article 98(2);

b. the object and purpose of the Statute, which, as noted above, would be undermined by a patchwork approach that subjected the Court's jurisdiction to different (and potentially abusive) limitations on domestic competence;

c. the *travaux* which, as noted above, supports the "*automatic jurisdiction*" of the Court, which would be achieved here by States automatically delegating their general customary international law jurisdiction upon ratification/accession;

d. the practice of the Court in not reviewing the specific competence of the State Party or State accepting jurisdiction every time a referral or Article 12(3) declaration is made; and

e. the approach of the Court in *Situation in Bangladesh/Myanmar*, which was to enquire into the *general* criminal jurisdiction of States *under customary international law*.[26]

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[25] VCLT, Article 32. On the practice of an international organisation as relevant to the interpretation of its constitutive instrument under Articles 31-32 of the VCLT, see ILC, Conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties (2018), A/73/10, Conclusion 12(3) and paras. 26-37 of the commentary thereto.

[26] *Situation in the Republic of Bangladesh/Republic of the Union of Myanmar*, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, PTC III, ICC-01/19-27, 14 November 2019, para. 60. See also paras. 56-59 (inquiry into the general criminal jurisdiction of States under customary international law). Likewise, see *Situation in the Republic of Bangladesh/Republic of the Union of Myanmar*, Decision on the 'Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute', PTC I, ICC-RoC46(3)-01/18-37, 6 September 2018, paras. 65-66 (establishing the general position under customary international law), paras. 67-68 (using the examples of the domestic legal systems of Bangladesh and Myanmar to further bolster the position that custom permits States to prosecute cross-border crimes), and paras. 70-71 (concluding on that issue). The quote from para. 70 of the latter decision given in Zipperstein *Amicus*

9. Palestine has the same jurisdiction under customary international law as any other State.[27] Even as an occupied State, the *de jure* position is that the State of Palestine retains sovereignty over its territory and all the competence and authority that comes with it, as the ICJ has recently confirmed: "*the law of occupation does not deprive the local population's civilian institutions in the occupied territory of the regulatory authority that they may have*".[28]

10. The Oslo Accords cannot be relied on to dispute that Palestine possesses the same jurisdiction as any other State because they do not *grant* or *limit* Palestine's jurisdiction under general international law:

a. They do not *grant* Palestine jurisdiction because for that to be the case Israel would have to be sovereign over the Palestinian territory, which it indisputably is not. Not only is there no possible basis on which Israel could have acquired sovereignty (and with it, exclusive plenary criminal jurisdiction) over Palestinian territory,[29] UN bodies and the ICJ have consistently held the Palestinian territory, including Gaza, to be occupied (i.e. not subject to Israeli sovereignty),[30] and the ICJ has now authoritatively declared Israel's occupation of the Palestinian territory to be unlawful.[31] The ICJ specifically confirmed that occupation "*cannot transfer title of sovereignty to the occupying Power*" and clarified that the references in Oslo II to the "*transfer*" of powers and responsibilities to the Palestinian Council and the stipulations that Israel shall "*continue*" to exercise or "*retain*" certain powers merely preserved some of the exceptional temporary powers conferred on

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Curiae Observations, para. 21 is selective and misleading, as pointed out in Amicus curiae observations of Prof. William Schabas pursuant to Rule 103, 30 July 2024, ICC-01/18-257, paras. 12-15.

[27] Palestine acquired such competence upon becoming a sovereign State, as to which see *Situation in the State of Palestine*, Observations on behalf of Victims, ICC-01/18-123, 16 March 2020, paras. 19-21.

[28] *ICJ OPT Advisory Opinion*, para. 134. See also para. 159 ("*under the law of occupation, the control of the occupied territory by the occupying Power must be temporary in character. Thus, the law is based on the principle that the occupying Power shall preserve the status quo ante in the occupied territory*").

[29] As a former League of Nations mandate territory, Palestine had an "*international status*" and its sovereignty was "*in abeyance*" until it achieved Statehood, even following the termination of the mandate in 1948: *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, para. 52; *International status of South-West Africa, Advisory Opinion, I.C.J. Reports 1950*, Separate Opinion of Sir Arnold McNair, p. 150. None of the international law modes of acquisition of territory ((i) occupation of *terra nullius*; (ii) prescription (acquiescence of the existing sovereign to acts *à titre de souverain* of another State); (iii) cession and (iii) accretion) provide a basis on which Israel could have acquired sovereignty over the Palestinian territory. The use of force (even if Israel were acting in self-defence) in or since 1967 does not provide a basis for the acquisition of territory, nor does occupation: *ICJ OPT Advisory Opinion*, paras. 105, 159 and 178-179.

[30] See, e.g., UNSC Resolution 465, UN Doc. S/RES/465, 1 March 1980; UNGA Resolution ES-7/6, UN Doc. A/RES/ES-7/6, 19 August 1982; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004* (***Wall Advisory Opinion***), para. 78; Report of the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel, UN Doc. A/77/328, 14 September 2022, para. 7; UNHRC Resolution 52/3, UN Doc. A/HRC/RES/52/3, 3 April 2023, para. 19.

[31] *ICJ OPT Advisory Opinion*, para. 261.

Israel under the law of occupation but did not add to or increase them.[32] This language therefore provides no basis for the assertion that Palestine possesses only such criminal jurisdiction as is purportedly conferred on it by the Oslo Accords.[33]

b. Nor do the Oslo Accords *limit* Palestine's jurisdiction under customary international law because: (i) as noted above, the fact of occupation does not deprive the occupied territory of its regulatory authority; (ii) Article XXXI(6) of Oslo II confirms that no rights were renounced or waived in concluding that agreement;[34] and (iii) any purported limitation on Palestine's jurisdiction arising from Oslo II is a matter only as between Israel and Palestine and it cannot limit Palestine's jurisdiction as a matter of customary international law (see further **Section IV** below).

11. In any event, to the extent the Court does exercise delegated jurisdiction, the Statute presumes that States Parties automatically delegate the same general international law jurisdiction to the Court upon ratification/accession, such that it suffices that Palestine is a State Party to the Rome Statute.[35]

IV. BILATERAL AGREEMENTS ARE ONLY BINIDNG *INTER SE*

12. As a matter of general international law, bilateral agreements only have effect *inter se* and are *res inter alios acta* with respect to third parties.[36] Accordingly, even if Oslo II were to be recognised as a treaty that binds Palestine,[37] it would operate only on a bilateral basis as against Israel and would not be opposable to third party subjects of international law, including the Court.[38] The same is equally true as regards a bilateral treaty that purports to create a broader competence for a State than exists under customary international law: such a broader

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[32] *ICJ OPT Advisory Opinion*, paras. 105 and 140.

[33] Cf. ECLJ Amicus Observations, paras. 10-13.

[34] Oslo II, Article XXXI(6) ("*Neither Party shall be deemed, by virtue of having entered into this Agreement, to have renounced or waived any of its existing rights, claims or positions*"). This appears to be ignored by the repeated references to waiver in Zipperstein Amicus Observations, paras. 2 and 5.

[35] *Situation in the State of Palestine*, Decision on the 'Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine', PTC I, ICC-01/18-143, 5 February 2021, para. 102.

[36] See *Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment, I.C.J. Reports 2012*, para. 95 ("*Treaties concluded by Colombia with neighbouring States … are* res inter alios acta *with regard to Nicaragua*"); *Anglo-Iranian Oil Company (U.K. v. Iran), Judgment, Preliminary Objections, I.C.J. Reports 1952*, p. 109 ("*A third-party treaty, independent of and isolated from the basic treaty, cannot produce any legal effect as between the United Kingdom and Iran: it is* res inter alios acta").

[37] This is not accepted: *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019*, para. 172 ("*In the Court's view, it is not possible to talk of an international agreement, when one of the parties to it … was under the authority of the latter*").

[38] Rome Statute, Article 4 (specifying that the Court has international legal personality and is therefore a subject of international law).

competence could not be delegated to and bind the Court.[39]

13. It follows that where Annex IV of Oslo II states that "*Israel has sole criminal jurisdiction over … offenses committed … by Israelis*"[40] in Palestinian territory, this does not mean that Israel has jurisdiction over its nationals to the *exclusion* of third parties, including the Court, because Oslo II cannot have that effect as a matter of general international law. This is so whether the Court exercises delegated jurisdiction or not. If it exercises *international* criminal jurisdiction, Oslo II has no legal effect *vis-à-vis* the Court. If it exercises general *delegated* jurisdiction, Palestine has not abandoned its jurisdiction as a matter of customary international law and so can delegate it to the Court. Any question about whether such a delegation constitutes a breach of Oslo II is a matter solely as between Palestine and Israel, and cannot affect the Court's jurisdiction.[41]

V. OSLO II CANNOT BE INTERPRETED AS AFFECTING PALESTINE'S DUTY AND CORRESPONDING JURISDICTION TO PROSECUTE INTERNATIONAL CRIMES

14. Even if the Court does exercise delegated jurisdiction specific to the State in question (*quod non*), Palestine's jurisdiction to prosecute or extradite in respect of international crimes cannot be excluded by the Oslo Accords.

15. The ICJ has confirmed that "*in interpreting the Oslo Accords, it is necessary to take into account Article 47 of the Fourth Geneva Convention*",[42] which provides that an occupied population cannot be deprived "*in any case or in any manner whatsoever, of the benefits of the present Convention … by any agreement concluded between the authorities of the occupied territories and the Occupying Power*".[43] Such benefits that cannot be contracted out of include the continuation in force of the penal laws of the occupied territory, the continued functioning of tribunals of the occupied territory and, importantly, the duty under Article 146(2) of GC IV on all High Contracting Parties "*to search for persons alleged to have committed, or to have*

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[39] The legality of any such treaty (or domestic law provision) would also be questionable.

[40] Emphasis added.

[41] Cf ECLJ Amicus Observations, paras. 18-23, which are confused in seeking to rely on treaty interpretation and treaty conflict rules that concern the relationship *between the parties* to the treaty, not its effect under general international law as regards third parties (as to which see also VCLT, Articles 34-36; Corten and Klein, *The Vienna Convention on the Law of Treaties* (2011), pp. 888-889 ("*The customary character of the rule is not in doubt*").

[42] *ICJ OPT Advisory Opinion*, para. 102.

[43] See also Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War, concluded 12 August 1949 (entered into force 21 October 1950), 75 UNTS 287 (***GC IV***), Article 7 (providing that no "*special agreement*" between High Contracting Parties "*shall adversely affect the situation of protected persons, as defined by the present Convention, nor restrict the rights which it confers upon them*").

ordered to be committed such grave breaches, and shall bring such persons, regardless of their nationality before its own courts" or extradite them for trial to "*another High Contracting Party*".[44] Accordingly, Oslo II cannot be interpreted as affecting Palestine's duty, or the corresponding jurisdiction, to prosecute or extradite Israeli nationals in respect of grave breaches of GC IV.

16. Moreover, the obligation to prosecute or extradite in respect of grave breaches in Article 146(2) of GC IV is an obligation *erga omnes partes* (owed to all other treaty parties) as well as a customary obligation *erga omnes* proper (owed to all States).[45] State practice evidences support for the existence of such a customary *era omnes* rule also in respect of other war crimes[46] and crimes against humanity.[47] A State may not contract out of *erga omnes* obligations by means of a bilateral agreement because such obligations are owed to a broader group of States, all of whom have "*an interest in compliance with them in any given case*".[48] As such, Oslo II cannot be interpreted as affecting Palestine's duty, or the corresponding jurisdiction, to prosecute or extradite Israeli nationals in respect of grave breaches of GC IV, as well as other war crimes and crimes against humanity.[49]

17. It follows that, in the same way that Oslo II cannot preclude the operation of Palestine's obligation to prosecute or extradite Israeli nationals, it similarly does not limit the Court's jurisdiction over such individuals for crimes in whole or in part committed on Palestinian territory. This is so even if the Court does exercise delegated jurisdiction specific to the State in question (*quod non*).

VI. CONCLUSION

18. For the foregoing reasons, the Oslo Accords are irrelevant to the Court's jurisdiction over

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[44] GC IV, Article 46 (and see also Hague Regulations, Article 43) and Article 146(2) (emphasis added). Palestine is a Party to GC IV, having acceded on 2 April 2014 (see Swiss Federal Department of Foreign Affairs, Notification 242.512.0 – GEN 2/14, 10 April 2014). The reference to handing over such persons to "*another High Contracting Party*" does not exclude handing them over to an international court: Pictet, *Commentary to GC IV* (ICRC, 1958), Article 146, p. 593.

[45] *Wall Advisory Opinion*, para. 157; Henckaerts and Doswald-Beck, Customary International Humanitarian Law (ICRC, CUP, 2005), Rules 157-158.

[46] Henckaerts and Doswald-Beck, Customary International Humanitarian Law (ICRC, CUP, 2005), Rule 158, summary of practice.

[47] ILC, Draft Articles on Prevention and Punishment of Crimes Against Humanity, with commentaries, A/74/10 (2019), draft Article 10 with commentaries thereto.

[48] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012*, para. 68.

[49] The Prosecutor's application for arrest warrants against the Israeli Prime Minister and Defence Minister were for grave breaches, other war crimes and crimes against humanity.

crimes committed by Israeli nationals in whole or in part in Palestinian territory.

19. One final factor relevant to the Pre-Trial Chamber's consideration of the Rule 103 observations is the ICJ's recent Advisory Opinion declaring Israel's occupation of the Palestinian territory to be unlawful. After finding that Israel must end its unlawful presence in the occupied Palestinian territory as rapidly as possible, the Court stated that it:[50]

> *considers that, in view of the character and importance of the rights and obligations involved, all States are under an obligation not to recognize as legal the situation arising from the unlawful presence of Israel in the Occupied Palestinian Territory. They are also under an obligation not to render aid or assistance in maintaining the situation created by Israel's illegal presence in the Occupied Palestinian Territory. It is for all States, while respecting the Charter of the United Nations and international law, to ensure that any impediment resulting from the illegal presence of Israel in the Occupied Palestinian Territory to the exercise of the Palestinian people of its right to self-determination is brought to an end.*

20. The Court is a subject of international law mandated to interpret and apply the Statute consistently with internationally recognized human rights,[51] including the right to self-determination (which the ICJ declared to be peremptory in the context of Israel's foreign occupation of Palestine[52]). The Court should therefore consider the extent to which giving effect to provisions of the Oslo Accords, which are predicated upon Israel's occupation of the territory of Palestine, would contravene the above-mentioned duties not to recognize as legal or render any aid or assistance in maintaining Israel's illegal occupation or its continuing breach of the right of the Palestinian people "*to self-determination, including its right to an independent and sovereign State, over the entirety of the Occupied Palestinian Territory.*"[53]

J. L. Stratford

Jemima Stratford KC
Catherine Drummond
Counsel, on behalf of Addameer

Dated this 6th day of August 2024,
At London, United Kingdom

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[50] *ICJ OPT Advisory Opinion*, paras. 267 and 279.
[51] Rome Statute, Articles 4(1) and 21(3).
[52] *ICJ OPT Advisory Opinion*, para. 233.
[53] *ICJ OPT Advisory Opinion*, para. 237.